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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARC GILBERT DOGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the delay between indictment and arrest violated petitioner's Sixth Amendment right to a speedy trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 64-105) is reported at 906 F.2d 573. The order of the district court (Pet. App. 62-63) adopting the report and recommendation of the magistrate (Pet. App. 1-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1990. A petition for rehearing was denied on September 12, 1990. Pet. App. 106-108. The petition for a writ of certiorari was filed on November 30, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Following his conditional plea of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. 963. The district court sentenced petitioner to three years of probation and ordered him to pay a $1000 fine, but did not impose a prison term. J.A. 114-115. The court of appeals affirmed. Pet. App. 64-105.

1. In late 1979, petitioner was involved in a scheme to import cocaine from Colombia. Undercover DEA Agent Douglas Driver, who was investigating the scheme, agreed to purchase 40 kilograms of cocaine in Colombia from petitioner's supplier, Fabio Moreno. Moreno sent Agent Driver to petitioner in Raleigh, North Carolina, to obtain a sample of the cocaine. On November 24, 1979, petitioner gave Driver 5.7 grams of cocaine and $6,800 in cash and told him to give the cash to Moreno in Colombia. As a result of Agent Driver's investigations, Colombian police seized 40 kilograms of cocaine and arrested nine persons in Colombia. Tr. 20-21; Plea Tr. 20-22.[1]

On February 22, 1980, a federal grand jury indicted petitioner and seven others on charges stem-

[1] "Tr." refers to the transcript of the December 14, 1988, hearing on petitioner's motion to dismiss the indictment. "Plea Tr." refers to the transcript of petitioner's guilty plea proceeding on February 6, 1989.

ming from the aborted importation scheme. On March 18, 1980, two North Carolina police officers went to the home of petitioner's parents in Raleigh to arrest petitioner.[2] Petitioner's mother told the officers that petitioner had left four days earlier for Colombia to get cocaine. She told them the number of the flight he was on and agreed to notify them if he came home.[3] That same day, Agent Driver entered petitioner's name in the Treasury Enforcement Communication System (TECS)[4] and alerted all United States Customs Stations and Interpol. The following year, before petitioner returned to this country, Agent Driver had petitioner's name entered in the National Crime Information Center (NCIC)

[2] The government did not attempt to arrest any of the defendants between February 22 and March 18, 1980, because it was trying to lure some of the foreign defendants into the United States in order to accomplish a simultaneous arrest of as many of the defendants as possible. J.A. 14-18.

[3] At the hearing on petitioner's motion to dismiss the indictment, Mrs. Doggett explained that she had contacted the police about her son's drug problems on earlier occasions, and that she encouraged the officers in their attempts to arrest him on that occasion. Tr. 172-174.

[4] TECS is the computer system used by customs agents to screen individuals entering the United States at airports and border crossings. See Pet. App. 67 n.2. Unbeknownst to Agent Driver, the notation in TECS was apparently cancelled later in 1980, before petitioner returned to the country. Agent Driver explained at the hearing that he had asked the Customs officials to arrest petitioner the next time he entered the country, and that his experience had been that Customs officials routinely honored DEA requests. Pet. App. 5, 68; J.A. 86-87; Tr. 167-170.

computer system.[5] Pet. App. 3-7, 66-68; J.A. 18-19, 23-24, 46, 55, 80-81; Tr. 190-191.

In October 1981, Agent Driver learned that Panamanian authorities had arrested petitioner for importing cocaine into that country. Agent Driver consulted a DEA representative in Panama to learn the best way to obtain custody of petitioner. The DEA representative advised Agent Driver to seek to have petitioner expelled to the United States at the conclusion of the proceedings in Panama. The DEA representative told Agent Driver that the expulsion procedure had worked in the past and that the United States ordinarily did not attempt to extradite fugitives from Panama. In accordance with that advice, the DEA formally requested that the United States be given custody of petitioner at the conclusion of the Panamanian proceedings. In response, on October 15, 1981, the DEA office in Panama received a letter from the Attorney General of Panama granting the request and agreeing to expel petitioner to the United States after the Panamanian proceedings were completed.[6] Pet. App. 7-8, 11-12, 68-70; J.A. 24-29, 68-72; Tr. 47-50.

In July 1982, petitioner was released from the jail where he was serving his Panamanian sentence.[7]

[5] NCIC is a national computer network that alerts law enforcement officers if a person they have arrested is wanted in another jurisdiction. Pet. App. 6 n.3, 68 n.4; J.A. 36-37.

[6] Petitioner complains (Br. 6) that no written evidence of the request was introduced at the hearing. The district court, however, expressly found that the request was made and that the Panamanian officials granted it. Pet. App. 7-8.

[7] The circumstances surrounding petitioner's release are unclear. Agent Driver testified that when he arrived in Panama in 1985, "the Panamanian authorities * * * didn't know [petitioner] was out," J.A. 60; see Tr. 117, although there appears to have been a court order authorizing his release, see Pet. App. 10-11; J.A. 88; Tr. 259.

Contrary to the earlier representation of the Attorney General of Panama, petitioner was not expelled to the United States, but instead was allowed to proceed to Colombia, where he stayed with his aunt for several months. The United States embassy in Panama apparently learned of petitioner's release and advised the Department of State, but the fact of petitioner's release was not conveyed to anyone in the DEA. On September 25, 1982, petitioner reentered the United States at Kennedy Airport in New York. Although he initially lived with his grandmother in Brown Summit, North Carolina, he did not visit his parents' home in nearby Raleigh, or even advise his parents that he had reentered the country, until after his marriage in the fall of 1983. Pet. App. 10-11, 13-14, 70; J.A. 88-89, 99-100; Tr. 3-4, 177, 181-182, 209, 212-214.

After learning in October 1981 that the Attorney General of Panama had agreed to expel petitioner to the United States at the end of his Panamanian prison term, Agent Driver took no further action, assuming that petitioner was serving a lengthy sentence in a Panamanian prison. Pet. App. 8-9, 70-71; J.A. 58-64. Agent Driver heard nothing more about petitioner's status until 1985, when he was transferred to Panama. Upon arriving in Panama, Agent Driver learned that petitioner had been released but could not be located. Pet. App. 10; J.A. 31-32, 74-75; Tr. 43. Agent Driver made no further attempts at that time to locate petitioner, because he believed petitioner was still outside the United States. Pet. App. 71-72. In response to questioning at the hearing as to why he did not attempt to locate petitioner by

running driver's license and credit checks, Agent Driver explained that those procedures were rarely successful and that the computer technology available at the time made such checks quite cumbersome. Pet. App. 72; J.A. 38-42, 52.

In September 1988, the United States Marshals conducted a special program designed to locate fugitives from drug charges. Petitioner's name and address surfaced in the course of that program, and petitioner was arrested on September 5, 1988. Pet. App. 20-21, 72-73; J.A. 91-96; Tr. 149, 153, 160-162.

Petitioner's mother testified at the hearing on the motion to dismiss the indictment that she had never informed petitioner of the outstanding charges. She admitted, however, that another of her sons had heard about the 1980 trial of petitioner's co-defendants, William Barnes and Allen Riddle. She also admitted that she had visited petitioner in Panama and had maintained contact with him while he was in Colombia. Tr. 178, 181, 186-187, 192-193, 202. Petitioner did not testify at the hearing, and he introduced no direct evidence as to whether he knew about the outstanding indictment.

2. Following an evidentiary hearing, the magistrate recommended to the district court that it deny petitioner's motion to dismiss the indictment. Pet. App. 1-61.

At the outset, the magistrate applied the four-part test established in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), and found no constitutional speedy trial violation. The magistrate agreed that the eight-year delay between indictment and arrest was "presumptively prejudicial." The delay was long enough, the magistrate concluded, to warrant an inquiry into the three remaining factors. Pet. App. 27-28.

With respect to the cause of the delay, the magistrate found that the government had made a good-

faith effort to find petitioner following his arrest in Panama by initiating the expulsion process, and that the failure to arrest petitioner after his release in Panama was attributable to "nothing more than 'bureaucratic negligence.'" Pet. App. 35. Because the delay was "not intentionally done for tactical reasons," but was instead the result of negligence, the magistrate weighed the cause of the delay against the government less heavily than he would have if the delay had been deliberate. *Id.* at 40-41.

With respect to the next factor, whether petitioner had asserted his right to a speedy trial, the magistrate assumed petitioner was unaware of the pending charges and therefore had no occasion to request a prompt trial. The magistrate therefore did not weigh that factor against him. Pet. App. 43.

Finally, the magistrate found that petitioner suffered no prejudice as a result of the delay, in the form of anxiety, pretrial detention, or actual impairment of his defense. Pet. App. 46-51. After weighing all the factors, the magistrate determined that petitioner's right to a speedy trial had not been violated. *Id.* at 52.

3. The district court adopted the report and recommendation of the magistrate and denied the motion to dismiss the indictment. Pet. App. 62-63. Petitioner then entered a conditional guilty plea to the charge of conspiracy to import cocaine. At the plea hearing, petitioner admitted that on November 24, 1979, he gave Agent Driver and informant Ivan Cifuentes 5.7 grams of cocaine, and he gave Agent Driver $6800 in cash to be delivered to Fabio Moreno in Colombia. Plea Tr. 21-22.

4. The court of appeals affirmed. Pet. App. 64-105. Like the district court, the court of appeals con-

cluded that the delay between petitioner's indictment and his arrest was presumptively prejudicial and that the government had an obligation to make a diligent, good-faith effort to locate and apprehend petitioner. *Id.* at 78-79. But because the government was, at worst, negligent in its efforts to locate petitioner and did not act in bad faith or with a dilatory purpose, the court did not weigh that factor heavily against the government. *Id.* at 80-86. The court next found that petitioner's failure to assert his right to a speedy trial was a neutral factor, because it was not clear that he was aware of the outstanding charges. *Id.* at 86-90.

Because two of the first three factors weighed against the government (the length and cause of the delay), the court held that petitioner's "showing of prejudice need not be as strong as if the majority of the factors had weighed against [him]." Pet. App. 92. Even so, the court concluded that petitioner had not made a sufficient showing of prejudice to warrant dismissal. The court observed that petitioner "was never subject to pretrial incarceration and could not have suffered any 'anxiety and concern' relating to his indictment until he first learned of it in September, 1988." *Id.* at 94. The court likewise found that petitioner did not suffer any prejudice after he learned of the indictment, because he did not show that his defense was impaired. In particular, the court could not find that the loss of some government tape-recordings of conversations involving the charged transactions impaired petitioner's defense. The court explained that petitioner had presented nothing to suggest that the tapes contained any exculpatory evidence or that the government had destroyed them in bad faith; the court also noted that

the individuals whose voices appeared on the tapes were all available to testify. *Id.* at 96-97.

Judge Clark dissented. Pet. App. 98-105. In his view, the government was "grossly negligent" in failing to locate petitioner for eight years, and therefore both the first and second factors of the *Barker* test should be weighed heavily against the government. *Id.* at 101-102. Judge Clark concluded that the absence of prejudice was insufficient to overcome the force of those factors. *Id.* at 102-105.

SUMMARY OF ARGUMENT

In determining whether a defendant has been denied his Sixth Amendment right to a speedy trial, this Court looks to four factors: the length of the delay, the cause of the delay, whether the defendant requested a speedy trial, and whether the defendant suffered prejudice as a result of the delay.

A. The first factor, the length of the delay, is a triggering mechanism for speedy trial claims. The passage of eight years between indictment and trial is exceptional, and ordinarily would be difficult to justify. In this case, however, the eight-year period of delay must be deeply discounted. Although formal charges were instituted in 1980, petitioner was not arrested or otherwise under any form of restraint until his arrest in 1988. Petitioner's situation therefore "does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, 404 U.S. 307, 321 (1971).

B. The cause of the delay in this case was a valid one: the government did not know where petitioner was. The government lost track of petitioner because he was absent from the United States during the first two and one-half years following the return of

the indictment. During that period, the government took several steps to secure petitioner's presence for trial. Shortly after the return of the indictment, officers tried to arrest petitioner at his home, but they learned from petitioner's mother that he was en route to Colombia. Nonetheless, they obtained credible assurances of future cooperation from her. DEA Agent Driver entered petitioner's name in the available law enforcement computer systems in an effort to ensure that petitioner would be located upon reentry or arrest in the United States. Finally, when petitioner was arrested in Panama, Agent Driver secured a written agreement from the Attorney General of Panama to deliver petitioner to the United States upon his release. Having taken those steps, Agent Driver justifiably believed that he had done everything reasonably necessary to secure petitioner's presence. Uncontradicted testimony shows that the techniques that Agent Driver failed to use were difficult, expensive, and generally not productive. Under these circumstances, the delay cannot be considered to be the fault of the government.

C. It is undisputed that petitioner did not assert his right to a speedy trial. Petitioner's only explanation is that he was unaware of the indictment against him and therefore could not be expected to demand a prompt trial. At the hearing on the motion to dismiss the indictment, however, the government presented strong circumstantial evidence that petitioner was aware of the indictment, and petitioner did not introduce any direct evidence to the contrary. The defendant bears the burden of establishing a constitutional violation, and in light of petitioner's failure to testify at the hearing or introduce any other direct evidence supporting his contention, petitioner did not satisfy the burden of justifying his failure to request a speedy trial.

D. Finally, petitioner has failed to show that the delay prejudiced him. Because he was not arrested and claims not even to have known about the indictment, he does not and cannot claim any prejudice in the form of pretrial restraint or anxiety about the pending charges against him. Moreover, because in pleading guilty he admitted that he engaged in the charged conspiracy and distributed cocaine to Agent Driver, he cannot claim that the delay prejudiced him by denying him an opportunity to prove his innocence.

Petitioner's claim of prejudice, at bottom, is that the indictment should be dismissed because the delay in prosecuting him resulted in a disruption in his life years after the events to which the indictment related. Whatever the force of that point as a form of "prejudice" in the abstract, however, it has no real force in this case. Because petitioner received only a modest fine and a term of probation, the criminal proceeding against him has not resulted in the kind of disruption that would have resulted from a prison sentence, which he very likely would have received if he had been arrested and tried shortly after indictment. To be sure, if the indictment is not dismissed, petitioner will be branded as a convicted felon, but that would have happened if he had been tried and convicted in 1980. Petitioner is therefore in effect using his speedy trial motion not to remedy an injury he has suffered as a result of pretrial delay, but to put himself in a better position than he would have been in if he had been promptly tried.

ARGUMENT

THE GOVERNMENT'S FAILURE TO FIND PETITIONER FOR EIGHT YEARS AFTER INDICTMENT DID NOT DENY HIM HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

As this Court recognized 86 years ago, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). The circumstances in this case, though unusual, did not deny petitioner his constitutional right to a speedy trial. There is no suggestion in this case that the government delayed petitioner's trial to gain a tactical advantage. Moreover, the government's failure to find petitioner for eight years caused him no anxiety, did not result in the loss of his liberty, and did not in any way prejudice his defense. Under these circumstances, the Sixth Amendment does not require that petitioner be granted complete absolution for a serious crime that he has admitted committing.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court set out a four-part test for determining whether the delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's Sixth Amendment right to a speedy trial. The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. 407 U.S. at 530-533. In our view, none of these factors supports petitioner's speedy trial claim.

A. Because Petitioner Was Not Held To Answer For The Charges Against Him, The Period Of Delay Does Not Support His Speedy Trial Claim

In *Barker* v. *Wingo*, the Court treated the period of delay as a "triggering mechanism." That is, until "there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530. The Court was quick to point out, however, that the delay factor is not a rigid one. Rather, "the length of delay that will provoke such an inquiry [into the other factors] is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-531.

The eight-year delay between the indictment and the trial proceedings in this case was, of course, quite long. But what is most important in assessing the length of the delay in this case is that petitioner was not arrested until September 1988 and claims not to have been aware of the indictment until that time.[8] He was therefore not in custody or subject to bail during that entire eight-year period. Moreover, in light of his claim that he did not know about the indictment until the day of his arrest, he was not even subject to the anxiety or humiliation that may accompany a pending charge of which the defendant is aware.[9]

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[8] Petitioner does not contend that the period between his arrest in September 1988 and his plea of guilty in February 1989, most of which was devoted to litigation of his dismissal motion, was improper or contributes in any way to his speedy trial claim.

[9] Of course, if petitioner was aware of the charges against him, his constitutional claim would be very weak because of his failure to come forward and request a speedy trial. See

The Court frequently has noted the significance of the date of arrest to claims under the Speedy Trial Clause: "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971). Thus, the Court has held that an arrest is sufficient to implicate the Clause, even in the absence of a formal indictment. See *Dillingham* v. *United States*, 423 U.S. 64, 65 (1975).

The converse is also true. Unless the defendant is arrested or otherwise held to answer on criminal charges, the core concerns of the Speedy Trial Clause are not implicated.[10] As the Court has explained, the "major evils" against which the Clause protects are "undue and oppressive incarceration prior to trial, [and] anxiety and concern accompanying public accusation."[11] *Marion*, 404 U.S. at 320. See *United*

Barker, 407 U.S. at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."); *id.* at 536 ("[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.").

[10] Although the historical materials relating to the Speedy Trial Clause are "sparse and unilluminating," *Marion*, 407 U.S. at 314 n.5, the Court has noted that the English Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, a principal predecessor of the Clause, "does not allude to delay before arrest." *Marion*, 407 U.S. at 314 n.6.

[11] *Marion* explained that a third goal of the Speedy Trial Clause is to "limit the possibilities that long delay will impair

States v. *Loud Hawk*, 474 U.S. 302, 311 (1986) ("The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."); *id.* at 312 (the "Speedy Trial Clause's core concern is impairment of liberty").

These concerns are not implicated in this case. The situation of the defendant who is unaware of the charges against him, "does not compare with that of a defendant who has been arrested and held to answer." *Marion*, 404 U.S. at 321.[12] Although not

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the ability of an accused to defend himself." 407 U.S. at 320. But the Court went on to explain that this concern—which it did not view as one of the "major evils" addressed by the Clause, *ibid.*—is dealt with adequately by statutes of limitations and other mechanisms, and thus, standing alone, is insufficient to justify expansion of the Clause's reach. *Id.* at 322-323; see *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations."). In any event, the lower courts found, and petitioner's guilty plea establishes, that there was no prejudice to petitioner's ability to prove his innocence in this case.

[12] Perhaps the best illustration of the principle that the assessment of a period of pretrial delay depends on the defendant's circumstances is the case of the defendant who avoids arrest and prosecution by leaving the country or remaining outside the country after charges are brought. Such a person should seldom, if ever, be entitled to make a claim under the Speedy Trial Clause, just as he cannot insist on the benefits of the statute of limitations. See *Streep* v. *United States*, 160 U.S. 128, 133 (1895) ("any person who

directly on point, the *MacDonald* and *Loud Hawk* cases are the most helpful authorities from this Court on the issue.

In *United States* v. *MacDonald*, 456 U.S. 1 (1982), military charges against the defendant were dismissed in 1970. Although military and civilian investigations continued, civilian charges were not filed until 1975. The Court held that the five-year period between the dismissal of the military charges and the filing of the civilian charges should not be counted in determining the length of the pretrial delay. During the intervening period, the Court explained, MacDonald "was not under arrest, not in custody, and not subject to any 'criminal prosecution.'" 456 U.S. at 10. "He was free to go about his affairs, to practice his profession, and to continue with his life." *Ibid.* The reinstated charges therefore were not subject to dismissal on the ground that the government had failed to comply with its constitutional obligation to provide MacDonald with a speedy trial, even though he was subject to "undesirable consequences flowing from the initial accusation by the Army and the continuing investigation after the Army charges were dismissed." *Ibid.*

In *Loud Hawk*, the district court twice dismissed the indictment, and the government twice had the dismissals overturned on appeal. The issue before this Court was whether the time during which the case was on appeal was to be counted as part of the period of pretrial delay for purposes of the Speedy Trial Clause. The Court held that even though the government was pursuing appeals during that

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takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offence, can have no benefit of the limitation, at least when prosecuted for that offence in a court of the United States").

period, the time should not be counted for speedy trial purposes, because the defendants were not subject to restraints on their liberty; their situation did not "compare with that of a defendant who has been arrested and held to answer." 474 U.S. at 311. The Court therefore concluded that "when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." 474 U.S. at 312.

This case differs from *MacDonald* and *Loud Hawk* in that the indictment in this case was pending throughout the period between 1980 and 1988, while in those cases the charges had been dismissed, either by the government or by the court. Nonetheless, the Court's analysis of the interests protected by the Speedy Trial Clause and the critical role of restraint on liberty in that analysis is instructive here. Because petitioner was not incarcerated and was under no restriction on his liberty during the period between 1980 and 1988,[13] *MacDonald* and *Loud Hawk* suggest that that period should be disregarded, or at least significantly discounted, in the speedy trial calculus. In fact, because petitioner claims not to have been aware of the indictment, he did not experience the anxiety and expense suffered by the defendants in *MacDonald* and *Loud Hawk* while they were awaiting the reinstatement of the charges against them; in that sense, there is an even stronger argument here

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[13] The period of petitioner's incarceration in Panama cannot, of course, be charged as a restraint on liberty attributable to the United States, because he was held there for violations of Panamanian law.

than in those cases that the eight-year period of delay should not be charged against the government.

The Speedy Trial Act of 1974 underscores the significance that attaches to the fact of arrest in the speedy trial context. When Congress sought "to make effective the sixth amendment right to a speedy trial," S. Rep. No. 1021, 93d Cong., 2d Sess. 1 (1974), it provided that the statutory clock would run from the date the indictment was made public or "the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). In other words, the statutory speedy trial guarantee is not activated until the defendant has been held to answer on the charges; return of the indictment alone does not start the 70-day clock. *United States* v. *Hermanski*, 861 F.2d 1240, 1241 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Montoya*, 827 F.2d 143, 152 (7th Cir. 1987); *United States* v. *Thirion*, 813 F.2d 146, 153 (8th Cir. 1987).[14] Although Congress's judgment as to the critical stage for triggering speedy trial concerns does not govern the scope of the constitutional provision, it provides useful guidance from a coordinate branch of government in applying the speedy trial guarantee to the facts of particular cases.

In sum, under the circumstances presented here, petitioner is not entitled to the presumption of prejudice that normally would attend a delay of the length

[14] The same result would be reached under Federal Rule of Criminal Procedure 48(b), which was the exclusive non-constitutional speedy trial provision before the enactment of the Speedy Trial Act of 1974. As the *Marion* Court noted, the "rule clearly is limited to post-arrest situations." See *Marion*, 404 U.S. at 319.

involved in this case. Indeed, because petitioner was not deprived of his liberty or otherwise subject to restraint during the period of delay, petitioner is in the same position he would have been in if his indictment had not been returned shortly after the crime (as it was), but had been delayed until shortly before the expiration of the statute of limitations. In that event, the length of the delay between indictment and arrest would have been much shorter, but the effect of the delay on petitioner would have been the same. Under either scenario petitioner was subject to none of the restraint, anxiety, and embarrassment that the Speedy Trial Clause was designed to minimize. Thus, because the eight-year period between indictment and arrest did not implicate any of the core concerns of the Clause, the length of the delay does not justify dismissal of the indictment.

B. The Government Cannot Be Charged With Responsibility For The Delay

The second factor from *Barker* v. *Wingo*—the cause of the delay—also does not favor petitioner. It is true that the government generally has a duty to make a diligent, good-faith effort to bring an indicted defendant to trial promptly. See *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969). But the burden imposed by that rule must be evaluated in light of the facts of the cases in which the burden has been acknowledged; in all those cases the government knew the defendant's whereabouts and had the ready and unquestioned capacity to bring the defendant before its courts. See, *e.g.*, *Dillingham* v. *United States*, 423 U.S. 64 (1975); *Dickey* v. *Florida*, 398 U.S. 30 (1970); *Smith* v. *Hooey*, *supra*; *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). Close scrutiny of the government's efforts in those circumstances makes

sense, because the steps the government must take to conclude the proceedings are relatively straightforward and easy for a court to identify.

In contrast, if the defendant's whereabouts are unknown, the government's task is much more difficult, and the steps that will lead to the defendant's capture are less certain. Where apprehension of the defendant is delayed, it will often be easy to criticize the government's search efforts as misguided or taking too long. But such criticisms may ignore limitations on technology and manpower, as well as the agency's need to allocate resources to other investigations. The Speedy Trial Clause should not serve as a standing invitation to courts to second-guess agency decisions regarding the utility and cost of techniques used to locate fugitives.[15] Accordingly, the absence of a defendant ordinarily should be considered a valid reason for delay without the need for close and critical scrutiny of the techniques the government used to find him.

In any event, the government's efforts to find petitioner did not reflect negligence, and certainly did not reflect gross negligence, as petitioner contends. For the first month after the indictment, no attempts were made to arrest petitioner, because the government was attempting to entice other defendants into the country without alerting them to the pendency of the indictment. As the magistrate found, that was a valid reason for delay. Pet. App. 30-31. Then, on March 18, 1980, North Carolina police officers went

[15] The magistrate in this case engaged in just such second-guessing when he reviewed the government's assessment of the expense, burden, and value of various investigative techniques, J.A. 38-42, 52, and criticized what he perceived to be the lack of technological sophistication on the part of federal investigative agencies, Tr. 255.

to petitioner's home to make the arrest. The officers were met by petitioner's mother who told them that petitioner was en route to Colombia to buy drugs. Petitioner's mother cooperated with the police; she told them that drugs were ruining her son and that she had tried to have him arrested before. She promised that she would advise the officers when petitioner returned home. In light of Mrs. Doggett's cooperative attitude and firm promise of future assistance, Agent Driver reasonably believed that if petitioner returned to North Carolina, he would hear about it.

Also on March 18, 1980, Agent Driver entered petitioner's name in the TECS computer [16] and alerted Interpol and all U.S. Customs Stations. He later entered petitioner's name in the NCIC computer as well.[17] Having taken those steps, Agent Driver reasonably believed that if petitioner returned to the United States, he would be apprehended at the border. See *United States* v. *Blanco*, 861 F.2d 773, 778 (2d Cir. 1988) (government was diligent in its efforts

[16] The TECS notation may have been cancelled automatically before petitioner reentered the country, but if so, the cancellation was not the fault of Agent Driver or anyone else connected with this case.

[17] Petitioner criticizes Agent Driver's failure to have petitioner's name immediately entered into NCIC. Pet. Br. 6. As the court of appeals noted, however, Agent Driver's actions in this regard had no effect on the government's inability to locate petitioner, because the NCIC entry was made before petitioner entered the country, and it was still in effect when he did enter. The NCIC entry did not cause petitioner to be detained at the border because petitioner entered the country at John F. Kennedy Airport in New York. Because of the great number of persons entering at that point, customs officers there can do no more than conduct random NCIC checks on entering persons. See Pet. App. 36, 82 n.8.

to bring defendant to trial where defendant remained in Colombia for ten years and the government entered her name in the TECS and NCIC computers so that she could be arrested when she reentered the United States), cert. denied, 489 U.S. 1019 (1989).

When petitioner was arrested for smuggling drugs into Panama in September 1981, Agent Driver secured a written commitment from the Attorney General of Panama that Panama would expel petitioner to the United States after his prosecution and imprisonment there were over. Agent Driver employed the same procedures that our government normally uses to obtain custody of criminal defendants from Panama. He therefore reasonably assumed that petitioner would be delivered into United States custody upon his release from his Panamanian sentence. As the district court noted, see Pet. App. 31-33, Agent Driver cannot be criticized for failing to anticipate that the Panamanian government would allow petitioner to go free without complying with its commitment to produce him to United States authorities.[18] See *United States* v. *Bagga*, 782 F.2d 1541, 1543-1544 (11th Cir. 1986) (government made a

[18] Petitioner suggests (Pet. Br. 6) that the government should have attempted to extradite petitioner from Panama. But Agent Driver acted reasonably in relying on the advice of the DEA representative in Panama in choosing a more informal route. The expulsion procedure had worked in other cases, both before and after petitioner's arrest in Panama. See J.A. 29. Also, the DEA representative who advised Agent Driver told him that extradition was not customarily used in these situations. Tr. 47-48. Once the DEA advised Agent Driver that the Attorney General of Panama had agreed in writing to release petitioner to the United States, it was reasonable for him to believe that everything possible had been done to apprehend petitioner.

good-faith, but unsuccessful, effort to secure defendant's return from India).

The record rebuts petitioner's assertion that the government should have used driver's license and credit checks to find petitioner. Agent Driver and a representative of the United States Marshals Service testified at the hearing that those techniques are burdensome and generally ineffective. J.A. 38-42, 52; Tr. 149, 160-162. The clearest indication of their low level of effectiveness is that, although the program under which petitioner was finally located used all available techniques, including driver's license and credit checks, the program located only 225 of about 8,000 fugitives who were being sought under the program. Tr. 153. That result is not surprising, as common sense suggests that most fugitives are likely to use false names or otherwise avoid exposing themselves to discovery through such name-search devices.[19]

Finally, petitioner cannot reasonably blame the government for not continuing to make intensive efforts to find him during the entire eight-year period between indictment and arrest. After a period of time, a law enforcement agency may reasonably conclude that further efforts to locate an individual are [redacted] likely to have diminishing prospects of success. When a case reaches that stage, it is not surprising that a person who continues in fugitive status is most likely to be located only if he is arrested on another

[19] Petitioner suggests (Pet. Br. 16, 26) that the government has a duty to advise fugitives of indictments pending against them, and that the duty was violated here. As a general matter, of course, the government cannot notify persons it cannot find. In any event, the government went to petitioner's last known address and advised his family of the indictment, so any such duty was satisfied here.

charge or found through "fugitive sweep" programs such as the one that located petitioner.

In sum, petitioner's departure from the country in 1980 put him beyond the reach of government authorities and thus was a "valid reason" for the delay in arresting him. *Barker*, 407 U.S. at 531. Even if the government's search efforts in this case are regarded as inadequate or sloppy, negligence is only a neutral factor in the *Barker* balancing test. *Ibid.* Therefore, the cause of the delay is either chargeable against petitioner or, at worst, is a neutral factor that cannot be weighed against the government.

C. Petitioner Has Not Met His Burden Of Explaining Why He Did Not Assert His Right To A Speedy Trial

The third factor described in *Barker* is the defendant's assertion of his right to a speedy trial. The Court explained that a defendant has the "responsibility to assert a speedy trial claim," 407 U.S. at 529, and noted that the lack of a demand is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right," *id.* at 531-532. The Court added that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

Petitioner made no demand for a speedy trial, and he failed in the district court to explain why he did not do so. Petitioner argues here, as he argued in the court of appeals, that the government failed to prove that he was aware of the indictment, and therefore failed to show that he had any reason to request a speedy trial. The burden, however, was on petitioner to show that he satisfied his "responsibility to assert a speedy trial claim," *Barker*, 407 U.S. at 529. Just as a defendant who seeks the exclusion of illegally

seized evidence must prove that he had a protected Fourth Amendment interest in the place searched or the property seized, see *Rakas* v. *Illinois*, 439 U.S. 128, 148-149 (1978), a defendant who claims that his right to a speedy trial has been violated must either show that he demanded a trial or explain how he was prevented from asserting his right. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984) (defendant must show violation of Sixth Amendment right to assistance of counsel). It is entirely reasonable to put the burden on the defendant to establish why he did not assert that right, because the defendant is in the best position to know the true reason for his actions. See *Casey* v. *United States*, 276 U.S. 413, 418 (1928); *United States* v. *Denver & Rio Grande R.R.*, 191 U.S. 84, 91-92 (1903); 9 J. Wigmore, *Evidence in Trials at Common Law* § 2486, at 290-292 (J. Chadbourn rev. 1981).

The facts of this case strongly suggest that the reason petitioner did not testify that he was unaware of the indictment was because that testimony would not have been true. Two of his associates, William Barnes and Allen Riddle, were arrested on the indictment, tried, and convicted in 1980, and members of petitioner's family knew of those proceedings. Whether or not petitioner communicated with Barnes and Riddle following their arrests, it is difficult to believe that neither petitioner's family nor his associates in the drug trade told him about their arrests. In addition, there is nothing in the record to explain why petitioner returned to Colombia after his release from jail in Panama, unless he was seeking to avoid arrest in the United States. Nor does the record explain why petitioner avoided any contact with his parents in Raleigh for more than a year after he reentered the United States in 1982.

The evidence at the hearing showed that his parents did not even know he was in the country, although he was living nearby and became engaged and married during that time. These facts suggest that petitioner knew of the charges against him and hoped that the government would not find him.

In light of the circumstantial evidence suggesting knowledge of the indictment on petitioner's part, petitioner's evidence that he was not aware of the indictment falls far short of satisfying his burden of proof of showing his lack of knowledge. On that issue, petitioner offered only the testimony of his mother, who said that she had not told him about the indictment, Tr. 175-178, and his wife, who said petitioner did not tell her of the indictment, Tr. 202. Even if credited, that evidence falls far short of establishing that petitioner did not learn of the indictment from any source. Because petitioner failed to satisfy his burden of showing a justification for not requesting a speedy trial, his legal position should be the same as that of a defendant who was aware of the charges against him but who made no request to be tried.[20] For that reason, the third *Barker* factor, like the first two, does not support petitioner's claim of a speedy trial violation.

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[20] This position is not contrary to the findings below. The district court found that there was no evidence that petitioner knew about the indictment and assumed that the government bore the burden of proving knowledge. Pet. App. 42-43. The court of appeals mischaracterized the district court's finding of no evidence as a finding that petitioner was unaware of the charges. *Id.* at 86-87, 89-90.

D. Petitioner Was Not Prejudiced In Any Way By The Delay Between Indictment And Arrest

The final *Barker* factor is prejudice to the defendant. The court of appeals was correct in holding that prejudice—or the absence of prejudice—is the most important factor for speedy trial analysis. In determining the proper remedy for constitutional violations (or, in some instances, determining whether there was a violation at all), this Court has focused sharply on the prejudice that the challenged conduct caused the defendant. See, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361, 365-367 (1981) (rejecting dismissal of indictment as an appropriate remedy for an intentional interference with the defendant's right to counsel that did not prejudice the defendant); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (proof of prejudice is generally a necessary, but not sufficient, condition of dismissal for pre-indictment delay); *Strickland* v. *Washington*, 466 U.S. 668 (1984) (showing of prejudice to defense is a necessary component of claim of ineffective assistance of counsel); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (to establish violation of Sixth Amendment right to compulsory process, defendant must make a plausible showing that deported witnesses' testimony would have been material and favorable to the defense); *Brady* v. *Maryland*, 373 U.S. 83 (1963) (suppression of evidence that is material to guilt or punishment violates due process, regardless of good faith of the prosecution).

The same analysis applies to constitutional speedy trial claims. In fact, because in the speedy trial context dismissal "is the only possible remedy," *Barker*, 407 U.S. at 522, courts should be especially reluctant to grant relief in the absence of any showing of prejudice to the defendant. A delay in the trial that

works no injury of any sort on the defendant—or even aids the defendant in some respect—is difficult to characterize as action that denies the defendant the "enjoy[ment]" of his "right to a speedy and public trial."

This is not to say that prejudice is always required as a condition of finding a speedy trial violation. The Court in *Moore* v. *Arizona*, 414 U.S. 25 (1973), explained that it has "rejected the notion that an affirmative demonstration of prejudice [i]s necessary to prove a denial of the constitutional right to a speedy trial." *Id.* at 26. But even though prejudice is not, in effect, the controlling factor in finding a speedy trial violation, this Court's decisions have identified it as a very important ingredient of the speedy trial claim.[21] In all of the cases in which this Court has granted relief under the Speedy Trial Clause, the defendants suffered some form of prejudice. See *Dillingham* v. *United States*, 423 U.S. 64 (1975) (per curiam) (petitioner detained 22 months before indictment and trial); *Moore*, 414 U.S. at 25 (petitioner was subject to a prison detainer); *Dickey* v. *Florida*, 398 U.S. 30, 32 (1970) (petitioner was subject to a detainer); *Smith* v. *Hooey*, 393 U.S. 374, 378 n.8 (1969) (petitioner apparently was subject to a detainer); *Klopfer* v. *North Carolina*, 386 U.S. 213, 218 (1967) (pendency of indictment interfered with petitioner's work). When there has been no

[21] Although we believe the absence of prejudice will almost always defeat a speedy trial claim, dismissal of an indictment, even in the absence of an actual showing of prejudice, might be justified if, for example, the government caused a lengthy delay for the specific purpose of prejudicing the defendant's ability to defend himself or injuring the defendant in some other significant way. Cf. *Arizona* v. *Youngblood*, 488 U.S. 51 (1988).

such injury, it is difficult to justify terminating society's right to vindicate its interest in punishing the commission of crime.

There is no merit to petitioner's suggestion (Pet. Br. 23-24) that prejudice should be presumed if a defendant does not waive his speedy trial right and is not brought to trial for a period equal to the applicable statute of limitations. Nothing in this Court's cases would justify a bright-line rule focusing solely on the passage of time. *Barker* firmly held that courts are in no position to prescribe precise time periods within which defendants must be brought to trial. 407 U.S. at 522-523. And petitioner is incorrect to suggest (Pet. Br. 24) that his proposed rule gains support from *Marion*. In *Marion*, the Court held that time periods before indictment or arrest are not covered by the Speedy Trial Clause. It referred to statutes of limitations only to point out that they are the principal mechanism by which the law protects against "prejudice resulting from the passage of time," 404 U.S. at 322, and thus to justify the Court's holding that the Speedy Trial Clause had not been violated.

In determining whether there was prejudice in this case, petitioner's claims "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. The Court then identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Ibid.* Petitioner does not claim that he suffered either of the first two forms of prejudice, and the record rebuts any claim that he suffered the third.

Petitioner suggests (Br. 21) that because 17 tape recordings were lost and because one potential witness may have been unavailable, he may have lost some exculpatory evidence. As both of the courts below recognized, Pet. App. 48-49, 95-97, his claims of prejudice to his defense are purely speculative. Because the tape recordings were made in the course of the government's undercover investigation, it is far more likely that the missing items would have confirmed petitioner's guilt. See *Loud Hawk*, 474 U.S. at 315 (noting that delay can be "a two-edged sword" because the "passage of time may make it difficult or impossible for the Government" to prove its case).

In any event, it is not necessary in this case to speculate about whether the period of delay has deprived petitioner of an opportunity to establish his innocence. By pleading guilty to the conspiracy charge, petitioner has admitted every element of the offense and disclaimed any possible assertion of factual innocence. *United States* v. *Broce*, 488 U.S. 563, 569 (1989). The absence of "trial prejudice" has therefore been established conclusively here.

At the heart of petitioner's submission to this Court is a claim of prejudice different from those identified in this Court's earlier speedy trial cases: the disruption of petitioner's life caused by a belated arrest for crimes committed long ago. See Pet. Br. 19. Arguably this interest in repose does not implicate a type of prejudice cognizable under the Speedy Trial Clause. See *MacDonald*, 456 U.S. at 8 (the harm caused by the passage of time "is protected primarily by the Due Process Clause and by statutes of limitations"); see *Marion*, 404 U.S. at 322. But even if this interest is cognizable under the Speedy Trial Clause, we do not believe it is implicated

here, because on the facts of this case, the delay benefited petitioner much more than it injured him. At the time of his arrest, petitioner had been living an apparently normal, law-abiding life for some five years, a point that was not lost on the sentencing judge. Thus, the delay in this case gave petitioner the time and opportunity to prove what most defendants can only promise: that he is no longer a threat to society. There is little doubt that petitioner would have received a harsher sentence if he had been tried while he was still trafficking in cocaine.

Petitioner is not seeking to be put back where he would have been had he been tried promptly after his serious drug offenses; rather, he is trying to take advantage of the government's inability to locate him to improve his position. The only adverse effects of this prosecution on petitioner (other than the inconvenience and expense of having to defend against the charges) are a $1,000 fine, a three-year term of probation, and a criminal record. If the government had been able to locate him and bring him to trial promptly after his offense, he almost surely would have suffered each of those consequences, and probably a prison term to boot. Because petitioner is no worse off than he would be if he had been prosecuted within weeks of his indictment, he has not been "prejudiced" by the delay, even assuming that the Speedy Trial Clause is designed in part to serve interests of repose equivalent to those served by statutes of limitations in the preindictment setting. The Constitution therefore does not require that petitioner receive the windfall of complete absolution for his crimes simply because of the delay in effecting his arrest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfuily submitted.

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